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# EXHIBIT

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Case: 1-09-CV-134759

M. Rosales

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF SANTA CLARA**

JIM CORNETT, on behalf of himself and others similarly situated,

Plaintiff,

v.

NETFLIX, INC. and WALMART.COM USA, LLC,

Defendants.

Case No. 109CV134759

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

Complex Litigation Division

**BY FAX**

Plaintiff for this Complaint brought under California law against California Defendants for California residents for treble damages and injunctive and declaratory relief against Netflix, Inc. ("Netflix") and Walmart.com USA, LLC ("Walmart.com") (hereinafter collectively, "Defendants"):

**FACTS**

1. On or about May 19, 2005, Netflix and Walmart.com (a wholly owned subsidiary of Wal-Mart Stores, Inc.) agreed to divide the markets for the sales and online rentals of DVDs

in the United States ("Defendants' Unlawful Market Division Agreement"), with the specific purpose and intended effect of monopolizing and otherwise unreasonably restraining trade in the online DVD rental market.

2. Prior to entering into the Defendants' Unlawful Market Division Agreement, Netflix and Walmart.com were essentially the only direct competitors in the online DVD rental business, and both were also competitors in directly selling DVDs to consumers.

3. By May 2005, Netflix and Walmart.com (a wholly owned subsidiary of Wal-Mart Stores, Inc.) entered into an agreement by which Walmart.com would cease competing with Netflix in the online DVD rental business, and Netflix would promote the sales of new DVDs by Walmart.com online (and Wal-Mart Stores). In exchange, Netflix agreed to cease any sale of new DVDs.

4. Defendants' conspiracy enabled Netflix to increase its overpricing (and profits) by establishing higher subscription rates for DVD rentals. As a result of this contract, as well as Netflix's unlawfully and illegally obtained and maintained market and monopoly power, Netflix subsequently did in fact overcharge Plaintiff and Class members for subscription fees.

5. Under the Defendants' Unlawful Market Division Agreement, Netflix and Walmart.com agreed that they would restrain trade and eliminate competition. Walmart.com agreed that it would stop competing with Netflix in the online rental market. Netflix agreed that it would not sell new DVDs, but instead would promote the DVD sales of Walmart.com (and Wal-Mart Stores).

6. In promoting the sale of DVDs by Walmart.com (and Wal-Mart Stores), Netflix provided "consideration" for the agreement by Wal-Mart Stores and Walmart.com, so that Walmart.com would exit the online DVD rental market and simultaneously confirmed to Walmart.com (and Wal-Mart Stores) that Netflix would not enter the market to sell new DVDs, as Netflix was well-positioned and otherwise had the unilateral economic incentive to do.

7. Since entering into the Defendants' Unlawful Market Division Agreement, neither Wal-Mart Stores nor Walmart.com has rented DVDs online and Netflix has not sold new DVDs online to customers. The Defendants' Unlawful Market Division Agreement served to entrench

and enhance Defendants' respective dominant positions in this market and otherwise cause harm to competition, including enabling Netflix to charge higher subscription rates for online DVD rentals than it would have had they not entered into the agreement.

8. Online DVD "rentals" are a distinct and separate market from DVD "sales." The price of a new DVD depends heavily on how popular it is, including whether it is a new release or how successful the title originally was at the box office or on television. By contrast, online DVD renters are generally charged based on a monthly or yearly subscription fee.

9. Plaintiff and all other similarly situated consumers in fact paid higher subscription prices to Netflix.

10. This case is brought as a Class Action filed on behalf of all consumers in California who, during the period May 19, 2005 to the present, paid a subscription fee to rent DVDs from Netflix.

## PLAINTIFF

11. JIM CORNETT is an individual consumer who resides in San Francisco, California. During the Class Period, Plaintiff Cornett directly subscribed to Netflix for his personal, non-commercial use. Plaintiff Cornett is a member of the proposed Class and has been injured by Defendants' conduct.

## DEFENDANTS

12. Defendant Netflix is a corporation headquartered at 100 Winchester Circle, Los Gatos, California, 95032. Through its website, www.netflix.com, Netflix rents DVDs directly to consumers nationwide by charging monthly subscription fees, which allows customers to rent DVDs pursuant to various subscription plans. Netflix has possessed a market share of no less than 75% of the online DVD rental market in the United States at all times during the Class Period.

13. Defendant Walmart.com is a wholly owned subsidiary of Wal-Mart Stores. Walmart.com is a Delaware company with its headquarters and operations at 7000 Marina Boulevard, Brisbane, California 94005. It is the online component of Wal-Mart Stores' retail empire that is the leading seller of new DVDs in the United States. Prior to the conspiracy

alleged herein, Walmart.com was also a major competitor of Netflix in the online DVD rental market through the "Walmart DVD Rentals" service. Through the website, www.walmart.com, Defendant Walmart.com sells DVDs directly to consumers nationwide.

## JURISDICTION AND VENUE

14. This Complaint is filed pursuant to California Business and Professions Code sections 16720, *et seq.*, commonly known as the Cartwright Act. Under California Business and Professions Code section 16750(a), Plaintiff seek to recover treble the damages Plaintiff and the members of the Class have sustained due to Defendants' illegal activities.

15. Venue is proper in Santa Clara County under California Business and Professions Code section 16750(a), and California Code of Civil Procedure section 395.5. Defendant Netflix's principal place of business is in Santa Clara County.

16. The amount in controversy for the individual Plaintiff and for each Class member is less than $75,000 per Class member.

17. No portion of this Complaint is brought pursuant to federal law.

18. All the members of the proposed Class are residents of the State of California.

## CLASS ALLEGATIONS

19. Plaintiff brings this action on behalf of himself and the members of the Class, defined as comprising:

> All residents of California who paid a "subscription fee" to Netflix to rent DVDs online after May 19, 2005 up to the present.

20. The Class numbers in the thousands. The exact number and identities of the members are known by Defendants. Excluded from the Class are government entities, Defendants, their co-conspirators and their representatives, parents, subsidiaries, and affiliates.

21. The Class is so numerous and geographically dispersed that joinder of all members is impracticable.

22. There are questions of law and fact common to the Class and the members thereof. These common questions relate to the existence of the conspiracy alleged, and to the type and common pattern of injuries sustained as a result thereof. The questions include, but are

not limited to:

(a) Whether Defendants engaged in a contract, combination, or conspiracy to allocate markets;

(b) Whether Defendants unreasonably restrained trade in the online DVD rental market;

(c) Whether Defendants had the specific intent for Netflix to monopolize the online DVD rental market;

(d) The nature and character of the acts performed by Defendants in furtherance of the alleged contract, combination, and conspiracy;

(e) Whether the alleged contract, combination, and conspiracy violated California law;

(f) The anticompetitive effects of Defendants' violations of the law;

(g) Whether Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Class as a whole; and

(h) Whether the conduct of Defendants, as alleged in this Complaint, caused Netflix subscription fees to be higher than they otherwise would have been and thereby caused injury to the business and property of Plaintiff and other members of the Class.

23. The questions of law and fact common to the members of the Class predominate over any questions affecting only individual members, including the legal and factual issues relating to liability and damages.

24. Plaintiff is a member of the Class. Their claims are typical of the claims of other members of the Class, and they will fairly and adequately protect the interests of the members of the Class. Their interests are aligned with, and not antagonistic to, those of the other members of the Class.

25. Plaintiff is represented by Hersh & Hersh, a Professional Corporation, a law firm experienced with class action antitrust litigation and familiar with the Rules of this Court.

26. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Class treatment will permit the adjudication of relatively small claims by members of the Class who otherwise could not afford to litigate antitrust claims such as are asserted in this Complaint. This class action presents no difficulties of management that would preclude its maintenance as a class action.

## FIRST CAUSE OF ACTION

[Violation of Cal. Bus. & Prof. Code Sections 16720 (Cartwright Act)]

(Against All Defendants)

27. Plaintiff incorporates, as though fully set forth herein, each and every paragraph set forth above.

28. Defendants' conduct as alleged in this Complaint violates Cal. Bus. & Prof. Code Section 16720, et seq. (commonly known as the "Cartwright Act").

29. As alleged in this Complaint, Plaintiff and the members of the Class have been injured in their business and property as a result of the Defendants' violation of Section 16720 of the California Business and Professions Code, for which they seek treble damages pursuant to Section 16750, subdivision (a) of that Act.

30. As a proximate result of the Defendants' conduct, Plaintiff and the Class he represents have been damaged in an amount to be proven at trial.

## SECOND CAUSE OF ACTION

[Violations of Cal. Bus. & Prof. Code § 16727 (Cartwright Act)]

(Against All Defendants)

31. Plaintiff incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

32. Defendants' conduct as alleged in this Complaint further violates Cal. Bus. & Prof. Code Section 16727. The conduct includes, but is not limited to, contracts for the effect of which is to substantially lessen competition or tend to create a monopoly in the trade.

33. For the purpose of restraining trade and maintaining and profiting from its monopoly, Defendants have engaged in unlawful acts.

34. Defendants' behavior alleged herein has had, *inter alia,* the following effects:

(a) Price competition in the DVD rental market has been restrained, suppressed and/or eliminated; and

(b) Those who subscribe to DVD rentals have been deprived of the benefit of free and open competition.

35. Plaintiff and the other members of the Class paid supra-competitive, artificially

inflated prices in the DVD online rental market and higher subscription fees.

## THIRD CAUSE OF ACTION

[Violations of Cal. Bus. & Prof. Code § 17200. (Unfair Competition Act)]

(Against All Defendants)

36. Plaintiff incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

37. This Complaint is filed and these proceedings are instituted pursuant to sections 17203 and 17204 of the California Business and Professions Code, to obtain restitution, disgorgement, and other available remedies from Defendants for acts and business practices, as alleged herein, in violation of section 17200 of the California Business and Professions Code, commonly known as the Unfair Competition Act.

38. The conduct alleged herein violates California Business and Professions Code section 17200. The acts and business practices, as alleged herein, constituted and constitute a common, continuous, and continuing course of conduct of unfair competition by means of unfair, unlawful and/or fraudulent business acts or practices within the meaning of California Business and Professions Code section 17200, *et seq.*, including, but in no way limited to, the following:

(a) Defendants' acts and business practices as described above constitute violations of California Business and Professions Code section 16720, *et seq.*, as set forth above;

(b) Defendants' acts and business practices as described above constitute violations of California Business and Professions Code section 16727, *et seq.*, as set forth above; and

(c) Defendants' acts and business practices as described above, whether or not in violation of California Business and Professions Code sections 16720 or 16727, *et seq.*, are otherwise unfair, unconscionable, unlawful and/or fraudulent within the meaning of California Business and Professions Code section 17200.

39. Plaintiff and the other members of the Class are each entitled to full restitution or disgorgement of all revenues, earnings, profits, compensation, and benefits which may have been obtained by Defendants as a result of these business acts or practices.

40. The illegal conduct alleged herein is continuing and there is no indication that Defendants will not continue such activity into the future.

## FOURTH CAUSE OF ACTION

[Unjust Enrichment]

(Against Defendant Netflix Only)

41. Plaintiff incorporates and realleges, as though fully set forth herein, each and every allegation set forth in the preceding paragraphs of this Complaint.

42. Defendant Netflix has been unjustly enriched through overpayments of subscription fees by Plaintiff and Class members.

43. Defendant Netflix should not be allowed to retain the monetary benefits conferred via overpayments by Plaintiff and Class members of the subscription fees.

44. Plaintiff seeks disgorgement of all overpayments and establishment of a constructive trust from which Plaintiff and Class members may seek appropriate relief.

## PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and the members of the Class, prays for judgment against the Defendants, jointly and severally, as follows:

1. Determining that this action may proceed and be maintained as a class action and that Plaintiff be certified as Class representative;

2. That the unlawful trust, combination, agreement, and course of conduct alleged herein be adjudged and decreed to be a violation of section 16720 of the California Business and Professions Code, and that Plaintiff and the other members of the Class have been injured and damaged as a result of Defendants' violation of the Cartwright Act;

3. That Defendants' conduct tended to lessen competition, as alleged herein; that such conduct be adjudged and decreed to be a violation of section 16727 of the California Business and Professions Code, and that Plaintiff and the other members of the Class have been injured and damaged as a result of Defendants' violation of the Cartwright Act;

4. That Defendants be found to have engaged in unfair competition in violation of section 17200 of the California Business and Professions Code;

5. For declaratory relief and damages according to proof at trial, and that such amount be trebled;

6. For reasonable attorneys' fees pursuant to Section 16750(a) of the Business and Professions Code;

7. For prejudgment interest at the highest legal rate, from and after the date of service of the Complaint in this action;

8. Ordering Defendants, and each of them, their agents, servants, and employees, and all persons acting, directly or indirectly, in concert with them, to restore all funds to each member of the Class acquired by means of any act or practice declared by this Court to be unlawful or to constitute unfair competition under Sections 17200, et seq., of the Business and Professions Code;

9. For costs of suit;

10. That Plaintiff and the other members of the Class be granted such other and further relief as the nature of the case may require or as this Court deems just and proper.

Dated: February 12, 2009

HERSH & HERSH
A Professional Corporation

By ______________________
Mark E. Burton, Jr.,
*Attorneys for Plaintiff and the Proposed Class*